

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
LIBERTY INSURANCE CORPORATION, : 14-cv-02168-SUMMARY
JUDGMENT-JO
 et al., :
 Plaintiffs, :
 : - versus - : U.S. Courthouse
 : : Brooklyn, New York
 : :
Mohuchy, D.S. et al, : February 19, 2016
 Defendant :
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PRETRIAL CONFERENCE
BEFORE THE HONORABLE JAMES ORENSTEIN
UNITED STATES MAGISTRATE JUDGE

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1 THE COURT: Sorry to keep you waiting. Please
2 have a seat.

3 THE CLERK: Civil Cause for a Status
4 Conference, Liberty Insurance Corporation, et al. v.
5 Mohuchy, D.S. et al., case number 14-cv-2168.

6 Counsels, please state your name for the
7 record, beginning with the plaintiff.

8 MR. MARVIN: Daniel Marvin, Robert Stern and
9 John Mulvaney of Stern and Montana, LLP for the
10 plaintiffs.

11 Good morning, Judge.

12 THE COURT: Good morning.

13 MR. CHISARI: For the nonparties, Frederik
14 Eugen Jente and Yin Yang Harmony Acupuncture, by Louis
15 Chisari.

16 Good morning, your Honor.

17 THE COURT: Good morning.

18 MR. HORN: For the remaining defendants,
19 Charles Horn.

20 THE COURT: Good morning.

21 MR. HORN: Good morning.

22 THE COURT: All right. Folks, we've got -- and
23 tell me if I've missed something but I've got two motions
24 to quash by Mr. Chisari's clients and one motion to
25 compel by the plaintiffs and they're all sort of around

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1 the same issues, so I thought it would be useful to bring
2 you all in together on those three things. Is there
3 anything else that's outstanding?

4 MR. STERN: Well, excuse me, your Honor.
5 Robert Stern for the plaintiffs.

6 THE COURT: Yes.

7 MR. STERN: There is the application to -- we
8 would like, if the Court will entertain it, we would like
9 to make an oral application to renew the request for an
10 extension of expert discovery.

11 THE COURT: Let's put that off to the side.
12 Have I missed anything that's already been filed?

13 MR. STERN: No.

14 THE COURT: Okay, good. So let's deal with the
15 -- but remind me please if I forget to come back to that.

16 So let's deal with the motions. I'm happy to
17 take them up in any order but I thought it might make
18 sense given that on both of sides of the issues, a lot of
19 it comes down to the relevance of the materials that the
20 plaintiffs seek. If I could ask the plaintiff's counsel
21 to -- and I've read the papers but just walk me through
22 your pitch on the relevance of what you're seeking by
23 subpoena here.

24 MR. MARVIN: Sure, Judge. With respect to the
25 movant, although he has settled in this matter, the

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1 movant was part of what was --

2 THE COURT: I'm sorry, we've got two movants.
3 So if you could be clear.

4 MR. MARVIN: I'm sorry. The movant is Mr.
5 Jente and --

6 THE COURT: Right. We've also got Yin Yang.

7 MR. CHISARI: And Yin Yang. Your Honor, could
8 I clarify? Mr. Jente was the principal owner --

9 THE COURT: Right.

10 MR. CHISARI: -- of Yin Yang Harmony.

11 THE COURT: Right.

12 MR. CHISARI: So they kind of are together.

13 THE COURT: All right. So it's -- okay. All
14 right.

15 MR. CHISARI: Yeah.

16 THE COURT: Go ahead.

17 MR. MARVIN: With respect with that, there's
18 actually one movant. Mr. Jente is moving to quash to
19 different personal bank accounts.

20 THE COURT: Uh-huh.

21 MR. MARVIN: One from Bank of America and one
22 from Chase Bank.

23 THE COURT: Right.

24 MR. MARVIN: Now although the movant has
25 settled, the movant was part of what was essentially a

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1 continuous and centralized acupuncture scheme that
2 operated out of 1975 Linden Boulevard. Even when the
3 movant purportedly left that scheme in 2013, his role was
4 essentially taken over by defendant Luis, who is still a
5 defendant -- an active defendant in this matter and who
6 was mentored by Mr. Jente.

7 When the plaintiffs reviewed Mr. Luis' bank
8 records, we noted several suspicious things. The first
9 thing we noted was after Mr. Jente purportedly left his
10 role in the scheme, he was funneled approximately \$40,000
11 in a short period of time by Mr. Jente (sic).

12 THE COURT: Those are the checks that --

13 MR. MARVIN: I'm sorry. Yes, those are the
14 checks. By Mr. Luis, excuse me.

15 THE COURT: Okay. Just as a point of
16 information, I think this was in your letter but the
17 checks that you had as exhibits, you had the backs of the
18 checks also and the deposits, which accounts do those
19 show deposits into?

20 MR. MARVIN: Those are deposits into Mr.
21 Jente's personal bank account.

22 THE COURT: The ones that are issue here.

23 MR. MARVIN: Yes.

24 THE COURT: Okay. Go ahead.

25 In addition, we also noticed that Mr. Luis had

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1 a very suspicious pattern of massive deposits into his
2 bank account from monies generated from the acupuncture
3 scheme and immediate withdrawals of massive cash
4 referrals. And that money, we believe, was used as
5 kickbacks in the acupuncture scheme and is still
6 unaccounted for.

7 Now insofar as Mr. Luis replaced Mr. Jente in
8 the scheme, we believe Mr. Jente's bank records will show
9 a similar pattern of deposits, structured deposits and
10 structured withdrawals.

11 THE COURT: Let me stop you there. Let's
12 assume that's correct for purposes of argument. Why
13 would that be relevant to your case against Luis?

14 MR. MARVIN: Well, as I am explaining, your
15 Honor, the scheme was an ongoing -- it was the same
16 scheme.

17 THE COURT: Uh-huh.

18 MR. MARVIN: And we don't know how Mr. Luis is
19 going to try to explain away those deposits and those
20 withdrawals. He may try to use an innocent explanation
21 for those deposits and withdrawals and if we can get to
22 the root of the withdrawals and deposits within the
23 entire scheme, that will undercut any argument he'll
24 attempt to make.

25 MR. STERN: Your Honor, if I may add to what

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1 Mr. Marvin indicated?

2 THE COURT: Sure.

3 MR. STERN: The documents are relevant because
4 they, one, will demonstrate a fraudulent business plan.
5 When you look at what Mr. Luis did with respect to his
6 structured payments that he made from his P.C.
7 Acupuncture Works, to his personal accounts, and then
8 structured withdrawals, so that you would have \$8,000 for
9 example, deposited into his personal account and then
10 \$4,000 withdrawn. Then you would have all this cash,
11 hundreds of thousands of dollars, in cash, withdrawn over
12 a two-year period, that clearly evidences money
13 laundering from the P.C. to his personal accounts and
14 when you look at during the period that Mr. Jente closed
15 down his P.C. and Mr. Luis opened up Acupuncture Works in
16 2013, there's a seven-month period in which \$40,000 is
17 being kicked back -- being funneled back to Mr. Jente.

18 That very well may be money that was used to
19 pay kickbacks during that interim period before Mr. Luis
20 started to pay his kickbacks. So we should --
21 respectfully, the plaintiffs should be entitled to follow
22 the money to demonstrate that there's a fraudulent
23 business plan, that there is -- that this is how the
24 scheme to defraud was executed by the parties and
25 establish where the money went.

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1 When you have all this money -- and if you look
2 at Mr. Luis' payments, he can't explain all the cash
3 withdrawals. We know that based on his testimony. He
4 can't explain where that money is going. And what you do
5 have is a fraudulent business plan where he fraudulently
6 expensed all of the cash withdrawals which was really
7 income to him. He fraudulently expensed it on his
8 corporate tax returns and then reported lower income so
9 he wouldn't pay taxes. And the only reason I believe you
10 would do that is because you're not keeping that money.
11 Why would you pay taxes on it. It's a kickback. It's
12 money that you convert into cash and you are giving to
13 someone else. And that's exactly what happened here.

14 And since Mr. Luis testified that Mr. Jente was
15 his mentor and that Acupuncture Works were the immediate
16 successor to Mr. Jente's P.C., then it makes sense that
17 Mr. Jente would have done exactly the same thing that Mr.
18 Luis did.

19 And since he was a defendant on the case and
20 since we allege -- the plaintiffs allege that all of the
21 P.C.s operating out of that location operated in the same
22 manner following a common scheme to defraud, how can the
23 plaintiffs be deprived of the opportunity to establish
24 that yes, the predecessor P.C., Mr. Jente's P.C., was
25 engaged in the same exact scheme to defraud.

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1 THE COURT: All right.

2 MR. MARVIN: And one more thing alleged, your
3 Honor, what Mr. Stern said is -- he's describing what in
4 these type of cases which your Honor has seen before, a
5 classic example of what goes on. We have one P.C. which
6 disappears and the very next day another P.C. takes its
7 place without any startup costs, it treats the same
8 patients from the same facilities and is engaged in the
9 same scheme to defraud. It's essentially one continuous
10 operation where proof of the predecessor is highly
11 relevant, the proof of the fraud engaged in by the
12 successor.

13 THE COURT: All right. Thank you.

14 Mr. Chisari?

15 MR. HORN: Yes, your Honor. I've gone through
16 the summons and complaint and nowhere in the summons and
17 complaint do they allege Yin Yang Harmony Acupuncture or
18 Mr. Jente was a fraudulent corporation or paying
19 kickbacks. Nowhere in there do they allege he's a
20 predecessor or complied in this fraud. It's not alleged
21 in the summons and complaint. They let him out. They --

22 THE COURT: What has that got to do with the
23 argument here?

24 MR. CHISARI: Well, in other words, they're
25 trying to say that his prior business operation was the

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1 model for Mr. Luis' prior business --

2 THE COURT: Right.

3 MR. CHISARI: -- current business model, except
4 they never alleged that in their summons and complaint.

5 THE COURT: Why do they have to prove -- why do
6 they have to allege that to prove that the reason a jury
7 can infer that Luis and his company were acting in a
8 fraudulent way is correct and bolster that allegation by
9 resort to evidence not only about what Luis did but
10 resort to evidence about how it carries on a practice by
11 Jente.

12 MR. CHISARI: Well --

13 THE COURT: Why can't they prove it in that
14 way?

15 MR. CHISARI: Well, relevant -- revelent
16 (sic) --

17 THE COURT: Relevance is the word I think
18 you're searching for.

19 MR. CHISARI: Yes -- would be that because one
20 did it one way doesn't necessarily mean another and this
21 is a fishing trip and my point to that is these subpoenas
22 were issued before Mr. Luis even testified at his
23 deposition. So for them to say that Mr. Luis couldn't
24 explain his cash withdrawals must mean that Mr. Jente's
25 not going to be able to explain his cash withdrawals.

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1 They haven't deposed my client and their -- and these
2 subpoenas were issued before they had any of this
3 testimony from Mr. Luis.

4 THE COURT: Well, it's possible that the
5 argument would be weak or if they didn't have that
6 testimony but now they have it.

7 MR. CHISARI: Well, they have that Mr. Luis
8 can't explain his.

9 THE COURT: Yes.

10 MR. CHISARI: They have not test -- they have
11 not deposed my client.

12 THE COURT: Right. They will, I am sure,
13 right?

14 MR. CHISARI: Well, I believe his deposition is
15 scheduled for the 24th at this point.

16 THE COURT: Okay.

17 MR. CHISARI: And I would say maybe if he can't
18 answer their questions, there would be some relevance to
19 the bank records but at this point, there is no relevance
20 to those bank records because they have nothing to
21 contradict anything --

22 THE COURT: Uh-huh.

23 MR. CHISARI: -- that Mr. Luis has said.

24 THE COURT: I'm sorry. I didn't mean to cut
25 you off.

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1 MR. CHISARI: Your Honor, go ahead.

2 THE COURT: I just didn't want to lose track of
3 this question. In your letters, you had referred to the
4 bank accounts at issue, if the subpoenas are honored,
5 revealing privileged information.

6 MR. CHISARI: Well, there may be privileged
7 information as far as what he's paid his attorneys, which
8 could be attorney-client privilege and where the source
9 of those funds --

10 THE COURT: Isn't there black letter law in
11 this circuit that fee information is not privileged?

12 MR. CHISARI: Oh, your Honor, okay. I --

13 THE COURT: No, isn't that correct?

14 MR. CHISARI: I -- if your Honor is making that
15 representation, I believe it. I did not see it when I
16 was doing my research.

17 THE COURT: Okay. Have you determined and
18 determined that there are such payments?

19 MR. CHISARI: I have not gotten all the bank
20 records.

21 THE COURT: So it's speculative.

22 MR. CHISARI: It's speculative that there would
23 -- well, I know he's paid attorneys their fees but there
24 may be other privilege between him and doctors or his --
25 these are personal bank records. These aren't business

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1 bank records.

2 THE COURT: Wait a minute. How is something in
3 a bank record going to reveal a privilege and even if it
4 does, under clearly established third-party doctrine out
5 of the Supreme Court, Smith and Miller, when efforts by
6 ability in the future, and I know that's open to
7 question, doesn't the current state of the law make it
8 pretty clear that by giving it over to the bank, he
9 waived a privilege with respect to the bank seeing it and
10 so he can't say that that information is privileged?
11 Isn't that again just black letter case law?

12 MR. STERN: It is, your Honor.

13 THE COURT: So --

14 MR. CHISARI: But again --

15 THE COURT: -- what possible privilege might
16 there be?

17 MR. CHISARI: It's not there -- personal
18 information that he may not want out to the insurance
19 carrier. Unfortunately --

20 THE COURT: Is that privileged though?

21 MR. CHISARI: Privileged, no.

22 THE COURT: Okay. So I just want to --

23 MR. CHISARI: Yeah. No, I understand where you
24 are --

25 THE COURT: Because privilege would really

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1 trump a lot of arguments that they could make about
2 relevance.

3 MR. CHISARI: Right.

4 THE COURT: But that's why I am focusing on it.
5 Is there any viable privilege claims being made here?

6 MR. CHISARI: No, your Honor.

7 THE COURT: Okay. So go ahead with your
8 relevance argument.

9 MR. CHISARI: And we also feel at this point
10 this is just a fishing expedition because --

11 THE COURT: Yes.

12 MR. CHISARI: -- they had the opportunity
13 before they settled with Mr. Jente and Yin Yang
14 Acupuncture to do all this discovery and they chose not
15 to.

16 THE COURT: But does that bar them?

17 MR. CHISARI: I think it does, your Honor. At
18 this point, they're now trying to backdoor in --

19 THE COURT: But how does it bar them? You
20 know, I did notice that you didn't really cite in any law
21 in your letter and they cited some that accords with my
22 understanding of how the law works in this area, so how
23 does the fact by itself that your guy settled immunize
24 him from further discovery if that discovery is relevant?
25 I understand you say it's not relevant.

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1 MR. CHISARI: It's -- right.

2 THE COURT: But assuming --

3 MR. CHISARI: We take --

4 THE COURT: -- assuming it is relevant for
5 purposes of this question --

6 MR. CHISARI: Right.

7 THE COURT: -- how would your client's
8 settlement immunize him against further discovery of
9 relevant information -- you know, (indiscernible).

10 MR. CHISARI: I would believe that before they
11 could even get this discovery, they would have to depose
12 him to get some controversy that would make it relevant.
13 At this point, we don't believe any of the records are
14 relevant.

15 THE COURT: I see. Okay.

16 MR. CHISARI: And at this point, he's got --
17 you know, again, they're just -- they're, again, just
18 guessing. They're saying well, if this guy did it, this
19 guy must have done it because he said he's his mentor.
20 Well, we don't know that at all. You haven't questioned
21 him yet of any of his business practices and, in fact,
22 you settled --

23 THE COURT: Yes.

24 MR. CHISARI: -- with him before his business
25 practices were an issue.

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1 THE COURT: Okay. I do think that that
2 somewhat in a very important way mischaracterizes what
3 the plaintiffs are saying but I understand your argument.
4 Is there anything else you want me to consider on a
5 relevance issue?

6 MR. MARVIN: No, your Honor.

7 THE COURT: Okay. And Mr. Horn, anything you
8 would like to consider from your perspective?

9 MR. HORN: To be honest with, your Honor, as
10 far as representations, Mr. Luis was deposed. He was
11 questioned at length regarding what the nature of
12 withdrawals.

13 For 14 hours, he testified. He gave, you know,
14 concrete examples of what money was spent on. So that
15 was representation that I wanted to address.

16 And as far as this goes, I just wanted to point
17 out as I am more familiar with the case than Mr. Chisari
18 is, if you look through the complaint, your Honor, all of
19 the allegations say that the kickback scheme went from
20 either his client or my client to Mohuchy or Zolor -- I'm
21 going to mispronounce the name -- Gulchehra Zulunov.

22 THE COURT: Yes.

23 MR. HORN: Never once is it ever alleged that
24 there's any kickbacks or anything by and between my
25 client and his, for if there were in the fee splitting,

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1 it wouldn't be fee splitting. They're both
2 acupuncturists. They would be nothing wrong with it and
3 I think what this all comes down to is they've cast a
4 very wide net and at the end of the day, they're now
5 going into the personal records of someone who even at
6 its very core, has no direct relevance.

7 Now what your Honor said that well, if they
8 want to bring it into evidence to show well this guy did
9 it, perhaps so did my guy do it the same way, then I
10 don't even have an argument for that but I would just say
11 if you were going to weigh the two --

12 THE COURT: Uh-huh.

13 MR. HORN: -- it wouldn't -- invading someone's
14 privacy, there's no probative value to it. They were two
15 separate enterprises.

16 THE COURT: Uh-huh.

17 MR. HORN: And just saying the one guy did it,
18 therefore it's more likely than not that the next guy did
19 it but if you look at paragraph 86 of the complaint --

20 THE COURT: Uh-huh.

21 MR. HORN: -- if you look at the causes of
22 action which are the three -- I believe they're the --
23 hang on. I don't have it in front of me. And, your
24 Honor, before I go show you the cause of action, I would
25 just point out that fraudulently incorporated

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1 corporations in the complaint does not apply to Mr. Jente
2 or my client. It's a reference to other entities that
3 have been previously settled.

4 Now if you look, and I would direct your
5 attention, your Honor, to page 75.

6 THE COURT: Of what?

7 MR. HORN: I'm sorry, the complaint.

8 THE COURT: Okay. Give me a moment. Yes.

9 MR. HORN: Now if you go through these -- the
10 bullet points here, it talks about kickback schemes
11 between acupuncturists and the fraudulently incorporated
12 P.C.s, financial relationships between the acupuncturist
13 and the fraudulently incorporated P.C.s.

14 Going through -- this is further discussed upon
15 throughout paragraph 86, paragraph 5. You could go
16 through the complaint and all of the references talk
17 about a scheme of money going from acupuncturists to --
18 in this case, chiropractor or billing company. Never
19 anywhere in this complaint, does it allege any illegal
20 money was exchanging hands by and between our two
21 clients. Then --

22 THE COURT: Does it have to -- I'm sorry, but
23 is it -- perhaps I just have a fundamentally different
24 understanding of what discovery is for but does it have
25 to directly prove an allegation -- does that allegation

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1 have to be explicitly in the complaint before this
2 discovery is relevant?

3 MR. HORN: Well, if --

4 THE COURT: Does it have to be?

5 MR. HORN: Does it have to be in the complaint
6 before the discovery is relevant?

7 THE COURT: Yes, that particular allegation as
8 a matter of law.

9 MR. HORN: Yes, yes. I believe it would, your
10 Honor.

11 THE COURT: I see. Okay.

12 MR. HORN: It must have some probative value.

13 THE COURT: This is where you're going to have
14 to seek review, I guess, because I disagree with that
15 proposition.

16 MR. HORN: And if I may, your Honor?

17 THE COURT: Of course, yes.

18 MR. HORN: During the course of this
19 litigation, specifically at the last conference held
20 before your Honor, the issue was we were seeking to know
21 to whom kickbacks were paid, when they were paid. Your
22 Honor made rulings on all of that but you made rulings
23 based on the representations of counsel that we could
24 read the complaint and figure out who the identities of
25 the individuals and then look to the financial records

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1 that were provided and then look at the name.

2 THE COURT: Uh-huh.

3 MR. HORN: But now they're alleging that
4 there's another party, someone who is not the biller or
5 the chiropractor they -- Mohuchy that they allege. So
6 what --

7 THE COURT: Yin Yang is all over this
8 complaint, isn't it?

9 MR. HORN: It is but there's never an
10 allegation that we're doing anything together.

11 MR. CHISARI: No, the allegation is we were --
12 there was never an allegation we were paying a kickback
13 to anybody.

14 THE COURT: Yes.

15 MR. CHISARI: There's allegations we rented
16 space, we had -- we treated the same patients. I mean,
17 that would almost be like taking a bunch of lawyers who
18 all operate in the same suite because I don't do wills
19 and trusts, I send him to Charlie because he does and
20 then somebody else in the suite gets in trouble for doing
21 something inappropriate as an attorney and then now we're
22 pointing a finger at all the attorneys in that office
23 must have done something wrong.

24 And again, Mr. Stern just brought out well,
25 they just -- he took out money and it must be a kickback.

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1 THE COURT: What are these payments because
2 there's like over \$35,000 of payment? What's that for?

3 MR. HORN: My client and his client are best
4 friends, your Honor. They --

5 THE COURT: Yeah, so what's it for? I have
6 some best friends too but I don't send checks to them
7 with that regularity to pay him 35K plus.

8 MR. HORN: He helped -- he helped my client set
9 up his company. They're both acupuncturists, perfectly
10 legal. Gave him money for his assistance --

11 MR. CHISARI: To start him --

12 MR. HORN: -- and that's what he testified to.

13 MR. CHISARI: And this is a repayment of that
14 money.

15 THE COURT: I see. All right. Anything else?

16 MR. HORN: On this topic?

17 THE COURT: Yes.

18 MR. HORN: No.

19 MR. MARVIN: Would you like to address the
20 motion to compel, your Honor, now? Would you --

21 THE COURT: Well, it's all pretty much the same
22 thing. I mean, it all goes down to the relevance and
23 frankly, there hasn't been any opposition to the motion
24 to compel.

25 MR. MARVIN: That's correct.

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1 MR. CHISARI: No, your Honor, and I would ask
2 for a brief time to put in a --

3 THE COURT: No, no.

4 MR. CHISARI: I was only retained by --

5 THE COURT: No.

6 MR. CHISARI: -- I was only retained by --

7 THE COURT: If you want to be heard on it, I'll
8 hear you but it's the same issue, right? It's the
9 relevance of these --

10 MR. CHISARI: At this point, it's all the
11 relevance, your Honor.

12 THE COURT: Yes.

13 MR. CHISARI: And Mr. Jente only retained me
14 yesterday, literally, to deal with Yin Yang. Again --

15 THE COURT: Look, Mr. Chisari, you've got a
16 hard job, all these lawyers do. You work hard for a
17 living. I get that and perhaps harder than I do, but I
18 don't think you're in an unfair position because you've
19 been litigating this issue for a little while now. You
20 know what the issues are.

21 MR. CHISARI: Yeah. No, no, your Honor. I do.

22 THE COURT: Is there anything you would want to
23 say on the motion to compel that you haven't already
24 said?

25 MR. CHISARI: No, your Honor.

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1 THE COURT: Oh, good.

2 MR. CHISARI: Yes.

3 THE COURT: All right. Because I think it's
4 fully heard and I think it really -- please, if anybody
5 disagrees with me about this analytical part of it,
6 regardless of who is making the motion, it really comes
7 down to whether the relevance showing that the plaintiffs
8 have made for all of these materials satisfies Rule
9 26(b)(1).

10 And, you know, on the plaintiff's side, I
11 should just point out, in your letter -- one of the
12 letters you were citing the old version.

13 MR. MARVIN: Okay.

14 THE COURT: Yeah, about reasonably calculated.

15 MR. MARVIN: We're aware, your Honor. We
16 apologize.

17 THE COURT: I don't think that the new version
18 changes the standard all that much. It moves in the
19 proportionality language from a different part of the rule
20 and it takes out the reasonably calculated. But it's
21 still -- you know, is there a showing of relevance? It
22 doesn't have to rise to the letter of admissibility. And
23 I think the reasonably calculated language is in an
24 important sense, replaced by the proportional. It
25 doesn't make sense for this case to give the parties

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1 seeking this discovery the ability to prove its case from
2 this information because they've made a specific showing
3 that might help to do it. I think they have.

4 I don't have to be persuaded that they're right
5 on the merits in terms of what it shows about the
6 relationships between the defendants and Jente and Yin
7 Yang but I think it's certainly a basis for taking the
8 discovery. So on that basis, I am going to deny the
9 motions to quash and grant the motion to compel.

10 Oh, I am sorry, just to finish the record on
11 the -- on how I am getting there, the reason I think it
12 all comes down to relevance is because as Mr. Chisari
13 acknowledged, the privilege argument that was made in the
14 letter really does fall away. So it comes down to
15 relevance.

16 Okay. So Mr. Stern, you had raised a different
17 issue that you wanted to take up while we're here?

18 MR. STERN: Yes, your Honor. With respect to
19 the request, plaintiff's request for the -- to extend by
20 thirty days, expert discovery, we had reached out to Mr.
21 Horn. He needed to -- he indicated that he needed to
22 consult with his client and was unable to do so before
23 today's hearing and as a result, we would like to renew
24 our application without the defendant's consent and the
25 reason that we're asking for the relief that we are is

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1 because depositions are ongoing. Document complaint --
2 there are documents that haven't been provided that need
3 to be provided to our expert in order to review. It
4 wouldn't interview with any of the fact discovery that's
5 being -- that's ongoing. Parties have been working at a
6 breakneck pace since the Court's last scheduling order.
7 And --

8 THE COURT: Specifically, what are you
9 proposing?

10 MR. STERN: What we're proposing, your Honor,
11 is a thirty-day extension of expert discovery to the end
12 of March, rebuttal thirty days later and that would be
13 the end of all discovery.

14 THE COURT: I just want to see where we are in
15 the schedule here. Right now we've got all discovery on
16 February 29th. So you want an additional two months, it
17 sounds like.

18 MR. STERN: That is correct, in the initial
19 discovery and then the --

20 THE COURT: And what expertise are we talking
21 about here?

22 MR. STERN: We're talking about a forensic
23 accountant --

24 THE COURT: Uh-huh.

25 MR. STERN: -- who would need to review the

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1 financial documents, much of which hasn't been provided
2 yet but will be. We're talking about a medical expert
3 who will review the documents, as in the process of, and
4 we're also talking about law enforcement but primarily,
5 it's in connection with the forensic and medical.

6 THE COURT: Why hasn't this been done already?
7 I mean, I get there's some documents that you haven't
8 seen.

9 MR. STERN: It's ongoing, your Honor. It is
10 something that is taking place but there's still a large
11 volume of documents that have not yet been produced that
12 our expert would need to review and analyze before
13 issuing the report.

14 THE COURT: Mr. Horn?

15 MR. HORN: Your Honor, I am -- we were
16 contacted yesterday, by the way --

17 THE COURT: Okay.

18 MR. HORN: -- and I was in a deposition until 7
19 o'clock at night and so I didn't -- and I am meeting with
20 my client this afternoon this very topic but as I
21 informed Mr. Stern, if he was going to make this
22 application, I would have to oppose it.

23 Our position on this your Honor is I have
24 extreme trepidation when it comes to their
25 characterization of a law enforcement expert. What I --

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1 THE COURT: I don't understand. Wait. You're
2 talking about timing?

3 MR. HORN: Well, your Honor --

4 THE COURT: You're not talking about any kind
5 of Daubert motion.

6 MR. HORN: I understand that, your Honor. The
7 reason I am concerned is what I believe is going to be
8 attempted is a completely revamping of the allegations in
9 the complaint. I will be left naked, unable to ask for
10 any further discovery regarding this expert if we're only
11 extending the expert --

12 THE COURT: Why is that so? If they completely
13 change the character of the case when you get an expert
14 report, why can't you come to me and say look what they
15 did. It's unfair. Do you think I would just reflexively
16 say no matter how unfair it is to you, the deadline is
17 the deadline and so you are out of luck?

18 MR. HORN: No, your Honor.

19 THE COURT: So --

20 MR. HORN: If I may continue?

21 THE COURT: Yes.

22 MR. HORN: You have that issue of this sort of
23 amorphous expert which I really don't understand what he
24 would be without evading the province of the jury but
25 setting that aside, I haven't spoken to my client about

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1 it and I can't -- I have to object until I can speak to
2 my client about it.

3 THE COURT: I understand that you can't consent
4 but is there a way that you're prejudiced by the timing
5 or that it's -- there's some affirmative reason to oppose
6 it?

7 MR. HORN: I am, your Honor. I was away for
8 three weeks for military duty and I was compelled to
9 drive forward. I have been stuck to these deadlines with
10 a gun to my head. I am being compelled to bring in
11 associates that are brand new to litigate this case.
12 They have an entire firm behind them. My client is now
13 going to have to expend money for another two months.

14 I believe that the net that they have cast is
15 so wide it goes beyond any relevance, that it's going to
16 cost my client too much money and they will break him
17 financially.

18 THE COURT: But wait, wait, wait. If the
19 expert report were filed tomorrow, it would cost your
20 client the same, right?

21 MR. HORN: I'm sorry?

22 THE COURT: If their expert report were to file
23 tomorrow, it would cost your client the same to respond
24 and there would be no timing objection.

25 MR. HORN: It would but I don't believe that

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1 they're going to -- I think that they're still digging,
2 just as their evolving theory on this case -- and it has
3 been, your Honor. The theory they're going with right
4 now is not contained in the complaint. They can't --
5 they won't and they can't identify a single kickback that
6 was paid. They can't and won't identify a single fee-
7 splitting. I'm going to be taking the deposition of
8 their witness on Monday. I will be in a much better
9 position to know what their case is even about but to
10 consent to them, giving them thirty days to concoct a new
11 theory on this case and put my client in a worse
12 position, I think is -- I have to object at this
13 juncture.

14 THE COURT: All right. Well, then to avoid
15 concoction at a later date, tell me your theory, so it's
16 on the record and he knows what it is.

17 MR. STERN: Well, as we've -- as alleged in the
18 complaint, we allege that his -- that the defendants were
19 paying kickbacks to one or more of the P.C.s, Mohuchy
20 P.C.s and/or billing management companies including
21 Zulunov, in exchange for treating patients, claimants
22 pursuant to a predetermined protocol in which the
23 services weren't medically necessary.

24 And, in fact, Mr. Luis testified yesterday that
25 he introduces himself when claimants appear for -- at the

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1 location for services by Mohuchy P.C. and asks,
2 introduces himself, would you like acupuncture services.
3 So there's not even an issue of whether or not they're
4 medically necessary because they're just being asked and
5 then they go to see him.

6 So in any event, these claimants go to that
7 location and in exchange for a kickback, as we have
8 alleged in the complaint and has been our theory of the
9 case throughout consistently, and in exchange for that
10 kickback, they are seen for acupuncture services for
11 which they bill and those services are medically
12 unnecessary. But for the kickback, those claimants don't
13 go there.

14 Mr. Luis, Acupuncture Works, has no marketing,
15 has no advertising expense. Has absolutely no physical
16 signage on the outside of the door. There is no chance
17 that a claimant walking by that building on a given day
18 says I want to go to Acupuncture Works. They wouldn't
19 know it's there. So that's what the case is about.

20 THE COURT: Okay. Now I am not going to ask
21 you to respond to that and we're not litigating it here,
22 but now you have this record of what their theory of the
23 case is, and if you think that you get an expert report
24 that's changing the theory of the case that requires you
25 to come back for further discovery, I will certainly hear

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1 you because you shouldn't be unfairly prejudiced by that.
2 But I don't think that you can come back now and say is
3 that you don't know what the theory of the case is.

4 I wasn't sure that you could say it before but
5 I want to make sure that as of right now, you know it. I
6 am going to grant the extension absent the kind of
7 switching theory that I just referred to, absent that, I
8 am not going to extend deadlines further at all. The
9 case is too old. You guys need to get it done.

10 MR. CHISARI: Your Honor, I have just one other
11 issue with my client's records. I would like on the
12 record who they intend to release those records to.

13 MR. HORN: Yes, we -- I was going to mention
14 it. We have a confidentiality agreement. I think we
15 might want to -- if we are going to direct it, we can
16 incorporate him into the confidentiality agreement.

17 MR. CHISARI: Yeah.

18 THE COURT: I leave that all to you but I have
19 made the ruling on the motion to compel and the motions
20 to quash. All right. But guys, please, I really don't
21 anticipate any further extensions.

22 MR. HORN: Yes, your Honor.

23 THE COURT: So to the extent that you may count
24 on being able to get some more time later, don't say I
25 didn't warn you.

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1 MR. HORN: Thank you, your Honor.

2 THE COURT: Anything else for today, folks?

3 MR. MARVIN: Your Honor, may we just please
4 have a date for compliance by Yin Yang with the subpoena
5 which was the subject of the motion to compel?

6 THE COURT: Oh, yeah, yeah. Have it by next
7 Friday, please. Okay. Thank you, all. Have a very good
8 day.

9 MR. STERN: Thank you, your Honor.

10 MR. HORN: Thank you.

11 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 26th day of April, 2016.


Linda Ferrara

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